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IN THE

Supreme Court of The United States

October Term, 1964

No. 282 and No. 283

WINIFREDE RAILROAD COMPANY, a corporation, and THE CARBON FUEL COMPANY, a corporation,

Petitioners, (No. 282)

vs.

LUTHER RAY RUMBAUGH,

Respondent,

and

LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and UNITED MINE WORKERS OF AMERICA,

Petitioners, (No. 283)

vs.

LUTHER RAY RUMBAUGH,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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TERMS OF REFERENCE AND PRELIMINARY STATEMENT

"Respondent"—Luther Ray Rumbaugh, plaintiff in the District Court, appellant in the Circuit Court, and is herein the respondent.

"Railroad"—Winifrede Railroad Company, a corporation, and The Carbon Fuel Company, a corpora-

tion, defendants in the District Court, appellees in the Circuit Court, and petitioners herein, and sometimes called "Employer."

"Unions"—Local Union 14182 United Mine Workers of America, District 50, United Mine Workers of America, and United Mine Workers of America, defendants in the District Court, appellees in the Circuit Court, and petitioners herein.

"Fourth Circuit"—Fourth Circuit Court of Appeals.

The case involves the sufficiency of the respondent's complaint to properly allege subject-matter jurisdiction in the Federal Court.

Inasmuch as the statement of the case, opinions below, jurisdiction, questions presented, and statutes involved are adequately set forth in the petitions of Unions and the Railroad, they are not included herein. It is respectfully submitted, the opinions of the Fourth Circuit Court of Appeals more adequately reply to the contentions of the petitioners than anything respondent can add: 331 Fed. 2d 530; (R. 24); (Railroad's Appendix 8a and Union's Appendix 8a). Also, in this light to be considered, is the Fourth Circuit's PER CURIAM opinion 331 Fed. 2d 540; (R. 88); (Railroad's Appendix 25a); (Union's Appendix 25a).

While economy is an important factor to the respondent, it is also the thoughtful consideration that anything added to the above Fourth Circuit's opinions would be merely cumulative except possibly the additional argument in favor of amending the Complaint

to establish the right of action because of violation of respondents' Civil Rights. The Complaint is set forth in the Unions' petition in Unions' Appendix E, 48a, and the facts are stated in 331 Fed. 2d 532 in the opinion of the Fourth Circuit and as corrected in the per curiam opinion 331 F. 2d 540.

REASONS ASSIGNED FOR DENYING WRIT OF CERTIORARI

1.

The Fourth Circuit correctly determined the subject-matter jurisdiction exists in the District Court.

Petitioners, Union and Railroad strongly contend in their briefs that either the Railroad Adjustment Board or the National Mediation Board has exclusive jurisdiction of the present controversy under the decisions of this and other Federal Courts while at the same time asserting that the writs should be granted for the reason that important questions in the administration and interpretation of the Railway Labor Act, 45 U. S. C. A. 151 et seq. are raised.

The complaint alleges that respondent was an "hourly paid employee with no authority to hire, fire or discipline; he kept records on other employees of a clerical nature but with no supervisory function over them. He was given a title as foreman by the company for the purpose of signing locomotive inspection reports * * * the defendant unions have consistently refused membership to the complainant though he has frequently requested membership and this the unions have done in an arbitrary and discriminatory fashion

with bad faith. At the same time the union did permit others to join though designated as shop foremen * * *" (Union's Appendix 49a-50a).

These allegations are nowhere denied, Union and Railroad contend that Respondents' admissions in the complaint that he was given a title of "foreman" and had been informed by an attorney for the railroad that he had no rights under the agreement as he was a supervisory employee is sufficient to oust the District Court of jurisdiction in the first instance.

It will be noted that the Fourth Circuit held only that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction *without first hearing evidence on the question of Respondent's employment status.* The Court then adds that should the District Court find that respondent was not a supervisor the action should be heard upon its merits or, to the contrary, if it should find that he was a supervisory employee then a motion to dismiss could properly be entertained. The complaint substantially charges, and asserts as fact, that respondent is an employee within the craft for which Union is the purported bargaining representative, which facts are not denied, and under the principle first enunciated in *Steele* v. Louisville & Nashville R. R., 323 U. S. 192 (1944), and followed in *Tunstall* v. *Brotherhood* of *Locomotive Fireman*, 323 U. S. 210 (1944), and subsequent cases, federal courts have subject-matter jurisdiction to enforce the duty imposed upon bargaining agents to represent all employees fairly and without discrimination.

In the *Steele* case, supra, the Court noting that Section 3, First (i) [45 U. S. C. A. § 153, First (i)] provides only for reference of disputes between an em-

ployee and a carrier and makes no reference to disputes between employees and their representatives stated: "'* * * Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board'. Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 4, p. 7."

The Fourth Circuit's action in remanding the case and requiring the District Court to ascertain the facts determinative of its own jurisdiction presents no startling innovation, *Priest* v. *Chicago R. I. & P. R. R.* 189 F. 2d 813, 8 Cir. (1951), nor, if the allegations of the complaint are substantiated as to respondent's status as an employee, is there presented any question of first impression meriting the grant of certiorari. If Respondent is not a supervisor, no interpretation of the agreement is required. However, if upon a hearing, Union and Railroad should attempt to assert that the term "supervisor", as used in the agreement, has a meaning other than accorded it in common and ordinary usage the resolution of the definition of that term would be merely incidental and thus within the holding of this Court in *Moore* v. *Illinois Central R. Co.* 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. In *Slocum* v. *Delaware L. & W. R. Co.* 339 U. S. 239, the Court in distinguishing the *Moore* case noted: "'* * * * A common-law or statutory action for wrongful discharge differs

from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provisions of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

The cases cited in the argument of Unions and Railroad in urging error on the part of the Fourth Circuit are all distinguishable from the present case upon their facts.

BRT v. *Chicago River, & I. R. Co.*, 353 U. S. 30 (1957), presented the question of a union's right to strike as an alternative to rather than pursuing its grievances with the Railroad Adjustment Board; *California* v. *Taylor*, 353 U. S. 553 (1957), involved the applicability of the Railway Labor Act to a state-owned railroad; *Pennsylvania R. R. Co.* v. *Day*, 360 U. S. 548 (1959), was an action by an employee against the carrier for extra pay alleged to be due under the terms of a collective bargaining agreement; *Hester* v. *BRT*, 8 Cir. 206 F. 2d 279 (1953), was an attempt by messenger-baggagemen, previously recognized as a distinct craft, to compel the brakemen's union to represent them without discrimination; *Roberts* v. *Lehigh & New Eng. Ry.*, 3 Cir. 323 F. 2d 219 (1963), and *Britton* v. *Atl. Coast Line R. Co.*, 5 Cir. 303 F. 2d 274 (1962), were decided on the ground that the interpretation of a collective bargaining agreement, rather than discriminatory and unfair representation was involved. It will be noted that in the *Britton* case the Fifth Circuit remanded the case for amendment of the complaint, if the plaintiffs so desired, stating: "All

parties are in agreement that if a complaint properly sets forth the theory of illegal discrimination of a type similar to *Steele* v. *Nashville R. Co.*, 323 U. S. 192, ***** jurisdiction is properly in the Courts, rather than in the Railway Adjustment Board *****"

2.

The Fourth Circuit's holding that doctrine of pendent jurisdiction is applicable to the present case is correct.

Respondent's claim for wrongful discharge against the Railroad, procured by the Union in furtherance of the Union's unfair discrimination against him is supportable by, and as a practical matter inseparable from, the facts necessary to substantiate his federal rights under the Railway Labor Act. This, without more, brings the instant case within the purview of *Hurn* v. *Ousler* 289 U. S. 238. However, Unions argue, that under *Milam* v. *Settle* 127 W. Va. 271, 32 S. E. 2d 269, and previous West Virginia cases since no recovery could be had against an unincorporated labor association as an entity that no state cause of action exists. It is believed that Union's contention is without merit.

The second syllabus of the *Milam* case is as follows:

"The liability for a tort being joint and several, the members of an unincorporated society or association, or any number thereof, may be sued as individuals, and judgment rendered against such of them as are served with process for their participation in any activity of any such society or association which operates to wrong another in his person or property."

West Virginia thus recognizes that a right of action exists and under Rule 17 (b) Federal Rules of Civil Procedure, such right would be enforceable against the Union as an entity. *Local 20, Teamsters* v. *Morton*, 12 L. ed 280, cited to the contrary in Unions' brief, merely held that a federal court lacked authority to award damages for acts which were unlawful under state law though permissible under the Labor Management Relations Act, on the ground that Congress had preempted the field. Furthermore, an employee is an individual citizen and is not deprived of the right to bring an action in Federal Court and also, "an employee is more than a ward of the Union and the employer," *Smith* v. *Evening News Association* 371, U. S. 195. See also, *Steele* v. *L. & N. R. R.*, 323 U. S. 192, 205, (1944). The "public policy" of West Virginia of "1872", served a purpose in its day but to this Respondent answers in the language of the opinion of the Fourth Circuit, "Since neither the Railroad Adjustment Board nor the National Mediation Board is the proper forum for this case, we hold that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction without first hearing evidence on the question of Rumbaugh's employment status. Should the District Court find, after examining the facts, that Rumbaugh was not a supervisor, then the action for invidious discrimination should be heard on the merits." 4 Cir. 331 F. 2d p. 538; (Union's Appendix 20a); (Railroad's Appendix 20a). The Union's argument concerning "public policy" of "1872" is superseded by the decisions of this Court. The failure of providing relief in the West Virginia Court is also another reason for being in the Federal Court since Respondent had no forum, "judicial or administrative competent to grant relief." The shades of "public policy" of "1872" is an-

other of the impossibilities that confronted Respondent. In this case—to sue the individual members of the Union is a virtual impossibility and it would also be like "suing a beggar and getting a louse" and the Respondent, like the Fourth Circuit, in the Per Curiam opinion which says of the Union's contention, "If it has merit" —Respondent believes the contention has no merit.

3.

The Fourth Circuit's holding is sustainable, and the District Court has jurisdiction under the Civil Rights Act. Rev. Stat. 1980 (3), 42 U. S. C. A. § 1985 (3).

When the allegations of the complaint are distilled, we have a picture of a "sweetheart" contract. Union and management declared a working truce to favor each other at the cost of the plaintiff and other minority members who are denied their rights, Yes! and denied even their right to inquire as to their rights. (The Complaint Union's Appendix E. 50a-51a.) See also Fourth Circuit's statement of the complaint 331 F. 2d 532, (R. 24) corrected 311 F. 2d 540, (R. 88).

Though the original complaint in the instant case did not assert the Civil Rights Act as a basis for Federal Court jurisdiction it is submitted that since a cause of action exists thereunder and may be asserted in an amended complaint, the Fourth Circuit's opinion is sustainable on that ground and provides a right of action for damages.

Rev. Stat. § 1980 (3), 42 U. S. C. A. § 1985 (3) provides in pertinent part:

> "If two or more persons in any State or Territory conspire * * * for the purpose of depriving,

> either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In Walker v. *Bank of America Nat'l Trust & Sav. Assn.* 268 F. 2d 16, the Ninth Circuit said: "In order to state a cause of action under section 1983, it is necessary to allege facts showing that the purpose of the defendants in committing the acts complained of was to discriminate between persons or classes of persons."

The Court, in the *Walker* case found that the pleadings therein contained only general allegations of such a purpose, unsupported by any factual allegations. In the instant case, respondents' complaint, taken as a whole, reflects an invidious discrimination by both union and employer, and conspiracy to injure him in his property and to deprive him of his equal protection of the laws and of his equal privileges and immunities under the laws. It is submitted that the complaint states facts that circumstances of the case are such that the complaint can, under Rules of Civil Procedure Rule 15, 28 U. S. C. A., be amended to state a claim under the provisions of 42 U. S. C. A. § 1985 (3). See also, *Lee* v. *Hodges*, 4 Cir. 321 F. 2d 480.

Furthermore, Respondent alleges that he was the owner of seniority and pension rights acquired over a period of 30 years of steady employment. The unlawful action of the defendants described in the complaint had the intended effect of depriving the complainant of these valuable property rights contrary to the Fourteenth and Fifth Amendments to the Constitution of the United States.

CONCLUSION

It is respectfully submitted that there is no error in the Fourth Circuit's ruling that the case be remanded for its preliminary hearing on the question of whether the Respondent can substantiate his allegations of subject-matter jurisdiction.

The Respondent is satisfied and in agreement with the Fourth Circuit's opinion, should this Court uphold that opinion and remand this case, it is submitted that there are questions which may ultimately again invoke this Court's consideration of the Respondent's complaint by way of the defenses thereto and the rights asserted therein. If Respondent has no right to be in this Court then the case is terminated but if the Court finds Respondent does have the right to continue litigation in the Federal Court, then it is respectfully requested, if this Court remands the case to the District Court in accordance with the Fourth Circuit's opinion, that the United States Supreme Court if it be proper at this time also consider sua sponte any of the unresolved questions which may ultimately be subject to this Court's future consideration as the Respondent being a working man and of extremely limited means,

can ill afford the expense, such litigation will impose upon him.

Respectfully submitted,

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